APPEAL NO. 92021

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992), as well as TEX. REV. CIV. STAT. ANN. art. 8309h (Vernon's Supp. 1992). On October 17, 1991, a contested case hearing was held. By decision dated January 2, 1992, (hearing officer) determined that the employee, the claimant herein, who suffered a compensable injury in the course and scope of his employment with _____ Volunteer Fire Department, was still disabled as of the date of the hearing, and the carrier, carrier herein, remained liable for benefits. The hearing officer also determined that claimant had not reached maximum medical improvement (MMI). The carrier seeks review of the hearing officer's decision, and, although its specific reasons for requesting review are not entirely clear, carrier indicates that three of the hearing officer's findings of fact, as well as two of its exhibits, compel a reversal of the recited decision of the hearing officer. That decision reads:

> [Claimant] suffered an injury on _____ and as he has not reached [MMI] and has a disability from that injury within the meaning of the Article 8308-1.03 (10), the carrier remains liable for benefits. [Claimant] has not earned wages.

Carrier argues that its exhibits, findings of fact made by the hearing officer, and evidence show that claimant is not disabled "within the meaning of the Act" and is not eligible for temporary income benefits (TIBS).

DECISION

We are reversing and remanding this case back for further development of the evidence on whether the revenues paid to the sole proprietorship are "wages," both before and after the injury, and whether the claimant was an "employee" when those revenues were paid. We believe that the hearing officer has erred by incorrectly interpreting the definition of disability in this case.

Article 8309h, Section 1(2) (Vernon's Supp. 1992), provides that a political subdivision may elect to provide workers' compensation coverage to volunteer firefighters "who shall be entitled to full medical benefits and minimum compensation payments under the law." The article further provides that certain sections of the 1989 Act will apply "except to the extent that they are inconsistent with this article." Article 8309h, Section 3(a). All definitions from the 1989 Act are incorporated except those for "employer" and "employee." The statute further directs that all references to "employer" in the 1989 Act should be read as "political subdivision." Article 8309h, Section 3(b). Under this article, the amount of weekly income benefits is set at the minimum weekly amount, because the computation of average weekly wage (AWW) under Article 8308-4.10, when read as dependent upon the amount paid by the political subdivision to the employee, would otherwise yield "0" benefits to an unpaid volunteer. *See* Texas Workers' Compensation Commission Appeal No. 91059 decided December 6, 1991. [Computation of average weekly wage under 1989 Act does not allow for consideration of wages from collateral employment].

I.

The claimant, was injured on _____, in the course and scope of his volunteer activities with the _____ Volunteer Fire Department. The claimant testified that he performed maintenance work on engines for this employer, as well as volunteer firefighting, for free, but the record is otherwise silent on the frequency of such work either before or after the injury. Instead, the parties at the hearing focused on claimant's ability to perform tasks relating to the welding business he operated at his residence before and after the injury.

Claimant testified that, except for a six-month period in _____ when he worked for another employer, he had his own welding shop for 21 years. Claimant testified that he did welding and fabricating in this business. Under

cross-examination, he testified that his work also involved work on motors and heavy equipment which did not involve any lifting. The business operated as a sole proprietorship; claimant testified that he did not pay himself a salary, but, whatever profit the company made, he lived on.

Claimant noted that if the business broke even one month, then it broke even. The only question either party asked specifically about income from operation of the welding business prior to the accident was from carrier, who asked how business was prior to the accident. Claimant answered that January and February were "slow" but that he had quite a bit to do. Claimant testified that when he talked to carrier's adjuster about income from his welding business, that he figured it based upon what he would have to pay someone else to do the job. No other evidence was brought forward as to the amount of income generated to claimant from this business prior to the injury.

Claimant testified that he was unable to perform work in his shop after the injury, and had to hire two employees in addition to his son to do the work. His wife also worked for the business by answering the telephone and keeping an eye on people out in the shop. The method or form of compensation to her, if any, is not in the record. The welding business took in money for projects performed both before and after the injury. Claimant testified that all money taken in was paid out for materials and expenses.

It must be pointed out that claimant never testified that his "wage" had gone down. Rather, claimant repeatedly testified that he did not derive "income" from the business after the injury. He stated that income, as far as he was concerned, was profit, something that he could put in his pocket. He stated that he had a job in progress at the time he was injured, and that the additional workers were hired in order for him to complete this job. Claimant stated that he did not supervise these employees during their work, other than to show them what to do because they had never worked for him before.

Claimant said that there were only two occasions when he worked in the shop following his injury, and this was done under orders from his physician, Dr. G, who told claimant to see what he could do. Coincidentally, the second of these occasions was observed for about an hour and a half on June 19th by an investigator for carrier, who also videotaped claimant at his shop for approximately 30 minutes around four o'clock in the afternoon. The first five minutes of the tape show claimant engaged in discussion with another man at the back of the pickup truck; both men appear to be touching an item in the bed of the truck, picking up pieces and pointing at something. This is followed by film of a mailbox; the tape then resumes as the pickup truck leaves and claimant begins operating a welding torch. In the course of this activity, claimant is bent over at about a 45-degree angle for one to two minutes at a time, then straightens up in a fluid motion to a standing position in between welding activity. At one point, claimant picks up an unidentifiable object and carries it to a spot behind him.

Claimant testified that he was working on a barbecue pit for his own use, and that he was not wearing a back brace when filmed, although one was prescribed for him later on. He said that the welding torch weighed about seven pounds, and his son did the lifting for him that day. He stated that he went into the house that evening, and was in considerable pain.

Testimony about the business' status at the time of the hearing was somewhat confusing. Claimant said that he would have to find something else to do and wouldn't be able to go back to welding. When asked if he had tried to work, he said no. During cross-examination, claimant indicated that he shut down his business when the issue came up about the videotape. He stated that this was because his understanding was that he couldn't have anyone work in the shop, not because he did not wish to be videotaped again. However, he said that he had not sold the welding equipment, and was not looking for a buyer, but kept it in hopes of getting back to welding in the future, if at all possible.

Regarding evidence of his medical condition, claimant testified that he went first to _____ Hospital following the

injury. He then chose Dr. G, an orthopedic surgeon whose letterhead indicates specialty in reconstructive spinal surgery, out of the telephone book. He stated that he did this because he would not be able to see the fire department doctor, Dr. F for two months. Records in evidence indicate that his first visit with Dr. G was April 10. An MRI was taken April 12 which indicated disc bulging and degenerative changes in the lumbar spine. Subsequent letters from Dr. G indicate that he saw claimant on May 15th and June 27th, 1991. During this time, claimant also participated in physical therapy which he described as unsuccessful in alleviating his pain. Dr. G's letters indicate that claimant continued to report pain. Claimant compared his pain to a toothache during his testimony, saying that sometimes it would be a normal pain, sometimes severe. Claimant testified that Dr. G released him to do light duty in July, he thought around July 4th. A document in evidence indicates that Dr. G later released claimant to work without restriction on October 3, 1991.

Claimant testified that he went to Dr. F in order to get a second opinion. He stated that he went because Dr. G indicated in July that there was nothing more he could do. He said that Dr. G said that surgery would relieve the pain but never would commit himself to surgery. He felt Dr. G "messed him around."

Claimant agreed that Dr. F was a bone specialist who did not do back surgery. He stated that Dr. F put him on a work-ready program of therapy which he indicated may have started in July and went into September. He described one aspect of the program as lifting weights in a basket. He stated that he could lift 10 pounds with no problem, but that 20-30 pounds would cause pain to his back. Claimant stated that he did more lifting in the work-ready therapy than when he tried to work again at his shop under Dr. G's orders. He stated that he went back to Dr. F when he finished this program, and that Dr. F referred him back to Dr. G for consideration of surgery. A prescription slip, dated September 9, 1991, from Dr. F, was submitted as Dr. F's "final report." It reads:

> [Claimant] has failed at ____ rehabilitation. He needs to be considered for fusion surgery. He is permanently disabled from heavy labor.

Claimant indicated that he returned to Dr. G on October 2, and that Dr. G told him he would have to retire or find something he could live with. He stated that the release-to-work statement was faxed on October 3rd to the fire department. (Carrier objected to testimony about this document on the basis that this was the first it knew of its existence, and was overruled, although claimant's attorney admitted that he "assumed" that carrier would have a copy. Carrier later incorporated this document as one of its own exhibits, thereby waiving any right to exclusion of such evidence under Article 8308-6.33(e)). Claimant stated that Dr. G did not perform a physical examination on this occasion, and that the faxed document was not consistent with what he was told. He stated that he did not know what Dr. G's conclusion was based on.

Claimant's son, Mr. CB, testified that his father told him that he needed him to come help when he couldn't work. When asked about the agreement concerning his pay, he stated that "I could have the money off it." He indicated that this was similar to the agreement he had whenever he did work for his father. Mr. CB said that he would collect the money, or, if paid by check, claimant would deposit the money and pay him. He indicated familiarity with the business, stating that most work for the customers was done on an hourly basis, but bigger jobs would be for a set price. Although Mr. CB's testimony was rather general, the only cross-examination concerned his willingness to help his father through testimony, which he stated he would do "within legal limits."

The carrier's major piece of evidence was the videotape presented through testimony of the investigator who took it, Mr. RG. He testified that he had 10 years experience operating video equipment, that a telephoto lens was used from his vantage point on the public street. He stated that he observed claimant for 15-20 minutes before the tape began, and for 30-40 minutes afterwards. Mr. RG indicated that no duplicate copies had been made of the videotape, indicating that it had not been exchanged in advance of the hearing as required by Article 8308-6.33(d)(5); however, it was admitted without

objection from claimant.

II.

We believe that the hearing officer erred in concluding that claimant was disabled within the meaning of the Act by misapplication of the statutory terms involved in this determination, and failure to develop evidence needed to evaluate "disability." Specifically, the hearing officer erred in consideration of "income" from welding business as "wages" under the Act, for purposes of determining disability.

Although Article 8309h secures to a volunteer fireman the minimum amount of income benefits, so that amount of wages is irrelevant in setting the amount due, the period for which TIBS are paid must be analyzed under Article 4 of the 1989 Act.

The 1989 Act no longer compensates an injured employee for "lost earning capacity" as was the case under the prior workers' compensation statute. The capacity to perform the same job, or the job of one's choice, is no longer the measure of entitlement to income payments. Income benefits accrue upon the eighth day of "disability" after an injury. Article 8308-1.03(16) defines disability as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Thus, the wages before and after an injury are compared; if the wages were equivalent to or greater after an injury, then, regardless of pain or medical condition, the employee would not have disability for purposes of receiving TIBS. *See* 1 J. Montford, A Guide to Texas Workers' Comp Reform, Sections 4B.22, 4B.23.

The comparison before and after an injury must be based upon "wages," not income. Article 8308-1.03(47) defines "wages," in pertinent part, as "every form of remuneration payable for a given period to an employee for personal services." [emphasis added]. An employee who receives money after an injury as interest on a bank account, as a landlord, or through an inheritance should clearly not have such amounts factored into the analysis of disability, because such amounts were received neither as remuneration, or in his capacity as an employee. Further, the wage that is used for workers' compensation purposes is the full amount paid by an employer, not net profit. Traveler Insurance Co. v. Curtis, 223 F.2d 827 (5th Cir. 1955) [court not required to deduct cost of maintenance of employee's truck for determining wages for workers' compensation purposes]; Texas Employers' Insurance Association v. Schwartz, 107 S.W.2d 666 (Tex. Civ. App.-El Paso 1937, error dism'd) [dairyman's wage cannot be reduced by amount he paid to assistant].

To determine whether money is received by a volunteer fireman on his regular job in his capacity as an employee, the definition of that term in Article 8309h must be followed. Article 8309h, Section 1(2) defines employee, in pertinent part, as:

> (2) "Employee means every person in the service of a political subdivision who has been appointed in accordance with the provisions of the article. A person in the service of a political subdivision who is paid on a piecework basis or on a basis other than by the hour, day, week, month, or year, who is a patient or client of a political subdivision involved in vocational training, or who is a prisoner incarcerated by a political subdivision is not an employee and is not entitled to compensation under this article. Provided, however, a political subdivision may cover volunteer firefighters, policemen, emergency medical personnel, and other volunteers that are specifically named who shall be entitled to full medical benefits and the minimum compensation payments under the law."

The injured employee has the burden to prove disability. Texas Employers' Insurance Ass'n v. Jenkins, 357 S.W.2d 475 (Tex. Civ. App.-Amarillo 1962, writ ref'd n.r.e.). Not only must the employee prove the differential between pre and post injury "wages" but a causal connection to the injury and not other factors must be established. Under prior law, in the

absence of evidence of wage rate at the time the injury is sustained, no issue was raised of the loss of earning capacity. Sonnier v. Texas Employers' Insurance Association, 417 S.W.2d 433 (Tex. Civ. App.-Houston 1967, no writ). Even under old law, the claimant bore the burden of proving the difference between average weekly wage before an injury, and AWW earning capacity afterwards. Texas Employers' Insurance Ass'n v. Bewley, 560 S.W.2d 147 (Tex. Civ. App.-Houston [1st Dist.] 1978, no writ).

In the case under consideration, there was no evidence at all of the total amount taken in by the welding business either before or after injury; the sole information given was that, after the injury, claimant did not have "income," as that term was defined by him. Virtually no testimony about the preinjury welding business income is contained in the record, other than an admission that January and February were "slow." Claimant's statement that if the business broke even, then it broke even indicates that profit may have fluctuated before the injury. There was evidence that welding revenues were generated either on an hourly basis or a piecework basis. The findings of fact made by the hearing officer appear erroneously grounded in concepts of earning "capacity."

7. In mid-July [Claimant] welded and fabricated in his shop. He earned no income by this activity.

8 [Claimant] is physically unable to perform the work in his welding shop because of his _____ injury. His _____ injury prevents him from seeking employment with another welding shop.

Further, the hearing officer's subsequent conclusion that claimant is disabled is based on an erroneous equation of wage with income.

Leaving aside the paucity of evidence in this case on the issues encompassed by the definition of disability, there is considerable question as to whether income derived from this business can properly be considered as "wages" under the Act. Generally, profits from a business are not considered as wages for purposes of establishing an AWW. 2 A. Larson, The Law of Workmen's Compensation, Section 60.12(e). In Texas, it has been held that a person cannot be both an employer and an employee within the workers' compensation act. Crawford v. DeLong, 324 S.W.2d 25 (Tex. Civ. App.-Austin 1959, writ ref'd n.r.e.) [spouse is co-owner of business as community property and cannot also be considered as employee of that business]. A partner and part-owner of a business cannot also be considered as an "employee" of that partnership. Superior Insurance Co. v. Kling, 327 S.W.2d 422 (Tex. 1959).

No cases directly on point concerning volunteer firemen could be found in Texas. However, Florida has dealt with the issue in the context of computing income benefit amounts. In Wilson v. City of Haines City, 97 So.2d 208 (Fla. App. 1957), it was determined that an independent contractor is not an "employee" within the workers' compensation act, but that earnings from such business accrued to him as an "employer;" therefore, a contractor injured while serving as a volunteer fireman could not have income earned as a self-employed contractor included in AWW. In Anna Maria Fire Control Dist. v. Angell, 528 So. 2d 456 (Fla. App. 1988), the court held that wages derived by an injured volunteer fireman from his electrical contracting business, which operated as a sole proprietorship, would not be included in the calculation of his workers' compensation benefits because he did not acquire such earnings as an "employee." The court noted that, under Florida law, a sole proprietor could give notice to the state of intent to be considered as an employee, but that the worker in this case had not done so. The Kentucky Supreme Court, interpreting a definition of wage in its compensation act that is substantially similar to that in the 1989 Act, declined even under a statutory admonition of liberal construction to extend the definition to include farm income derived by the injured employee, for purposes of computing compensation payments based upon "wages." Holman Enterprise Tobacco Warehouse v. Carter, 536 S.W.2d 46 (Ky. 1976).

We believe that under the 1989 Act, as a general proposition, a sole proprietor who essentially works for others as an

independent contractor, and does not pay himself a salary, has not earned remuneration in his capacity as an employee, and that, therefore, such income cannot be considered in determining whether an injured employee is "disabled." While we recognize that Article 8309h, providing for optional coverage for unpaid volunteers, necessarily means looking to other sources of income to determine the existence of "disability," we find nothing indicating that this measure should be based upon anything other than "wages," as defined by Article 8308-1.03(47), which definition is specifically brought forward into Article 8309h.

In our opinion, inclusion of welding revenues as "wage" could only occur if claimant earned money as an "employee" of another, or as an independent contractor deemed an employee by operation of Article 8308-3.05, or if carrier had agreed, through special rider in its policy, to insure volunteer firefighters against loss of "income" resulting from injuries. *See* Superior Insurance Co. v. Kling, supra. There was no evidence that any of these was the case. While it may appear that applying the "Florida" rule regarding volunteer firemen might, at first blush, appear harsh, there are two things to consider: first, that such a person would not be deprived of income benefits if disabled, as minimum weekly benefits would still be payable under Article 8308-4.23 and Article 8309h, Section 1, and second, self-employment income would not, standing alone, preclude a finding of disability, although the ability to generate income in one's own business could be a factor in assessing whether the inability to obtain and retain employment was caused by an injury.

III.

Considering the carrier's contention that the finding of disability is erroneous given the videotape evidence, and Dr. G's release to work, we would note that the hearing officer is the sole judge of the weight, materiality, relevance, and credibility of the evidence. Article 8308-6.34(e). His decision should not be set aside because different inferences and conclusions may be drawn on review, even though the record contains evidence of inconsistent inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). If the evidence supporting the hearing officer's determination is so weak, or if the decision is so against the overwhelming weight and preponderance of the evidence as to be clearly wrong and unjust, it is appropriate for the trier of fact to be reversed on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

In Texas Workers' Compensation Commission Appeal No. 91045 decided November 21, 1991, the Appeals Panel determined that a full release to work, standing alone, did not end disability. This decision indicated that, if a hearing officer found that such a release was "sufficient," then the burden would shift to the employee to prove that disability continues in spite of full release. The panel indicated that such evidence may include a demonstration of a job search which did not yield offers of employment. The hearing officer's decision would indicate, however, that he made no determination that the return to work order was sufficient.

In this case, the videotape is evidence of claimant's physical abilities, although it preceded Dr. G's release to work for light duty, and consequently cannot be taken as the linchpin of carrier's case. It was up to the hearing officer, as trier of fact, to weigh the evidence, and to believe, or disbelieve, all or part of any one portion of that evidence. In view of our decision to reverse and remand, we do not have to evaluate his decision in regard to whether it meets the great weight and preponderance of evidence standard.

We reverse and remand the case for further development of facts concerning the claimant's pre and post injury "wage," as well as whether claimant was an "employee" when those amounts were earned. We would note for the benefit of each party that all evidence must be fully exchanged in advance of the hearing, in accordance with Article 8308-6.33, or it should be disallowed by the hearing officer unless good cause for failure to exchange is demonstrated.

_____

Susan M. Kelley
Appeals Judge

CONCUR:

_____

Joe Sebesta
Appeals Judge

_____

Philip F. O'Neill
Appeals Judge